

1993

Royden V. Carter v. Shirley Hanrath, Magdalene Stevens, and Randy Carter : Reply Brief

Utah Court of Appeals

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SECRET NO. 930554 CA

IN THE UTAH COURT OF APPEALS

ROYDEN V. CARTER,

REPLY BRIEF

Plaintiff/Respondent,

Docket No. 930554-CA

vs.

SHIRLEY HANRATH, MAGDALENE
STEVENS, RANDY CARTER and O.B.
CARTER,

Defendant/Appellants.

Appeal from the Eighth Judicial District Court,
Duchesne County, Judge John Anderson

Argument Priority Classification 15

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Defendant/Appellant.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES & RULES**

None.

ARGUMENT

**I. APPELLEES ARGUMENT RELIES IN PART ON
FACTS WHICH ARE NOT SUPPORTED BY THE RECORD.**

a. Mrs. Shrader the predecessor in interest to Hanrath did not testify that she "inspected the property". Her testimony at pages 166-167 of the trial transcript was that she and her husband "walked back in there and walked up and down the river for a little bit and looked around; looked at

the trees and whatever was there and walked back out and left".

Mrs. Shrader never claims to have "inspected" the property. In fact, when asked by counsel about "inspecting the property" she corrected him by saying that they walked the property. (Tr. 166). It is clear that she and her husband casually visited the property; they did not even walk the entire parcel. Carter's use of the word "inspect" implies that there was a close examination of the parcel and that was simply not the case.

b. Appellee argues that when Defendant's purchased the property they were aware of the existence of the "old established fence lines" and that Plaintiff Carter and his predecessors in interest had exclusively occupied, improved, developed and claimed ownership of said property within confines of said "ancient fence lines and the ledges and cliffs". (Tr. 43-54 120-125). This mischaracterizes the testimony of Shrader and Hanrath.

Appellee's citations to the transcript record in support of this allegation are to testimony of Osborne Carter and Delbert Broadhead. There is absolutely no testimony from the Hanraths that they knew that Carter was claiming ownership of the property prior to their purchase. This is a rural area, not a subdivision. Defendants relied upon a plat map in ascertaining a general idea of the scope of their property prior to its purchase.

Shirley Hanrath specifically testified that she was not told that the Carters were occupying property she purchased from Shrader. (Tr. 241). Likewise Shrader testified that she was never aware that someone else was occupying her land. (Tr. 167, 171). The first time Hanrath knew that the Carters were claiming possession of the property was after she had purchased the property and was attempting to erect a fence along the property boundaries (Tr. 242).

The accurate representation of these facts is important because they bear directly on the issue of acquiescence and it is appellants position in this appeal that Carter failed to establish acquiescence to the alleged boundary line.

II. OCCUPATION OF THE PROPERTY FOR A LONG PERIOD OF TIME WITHOUT DISPUTE IS INSUFFICIENT TO ESTABLISH A BOUNDARY BY ACQUIESCENCE.

a. The facts do not support a finding of acquiescence.

Carter argues that he and his predecessors occupied the property up to a definite fence line and certain ledges and cliffs. The record certainly supports that they used and occupied the land in question as if it was theirs. Appellants dispute the fact that the fence and the ledges and cliffs imparted notice to them or their predecessor that the Carters were treating them as a boundary and occupying the property up to them. In fact, Mrs Hanrath testified at page 227 that she had observed only "a partial fence line between the Carters and the

hanrath property" and that she observed the fence went North to a point where the brush became too thick to observe a fence (if one existed) through there.

More importantly though, Carter has not established any acquiescence on the part of Hanrath or her predecessor. Occupation of property alone is insufficient to establish a boundary by acquiescence. In the present case the Hanrath's predecessor, Mrs. Shrader, was a non-resident landowner. She visited the property once for approximately 45 minutes. Her testimony was that she did not observe any one else occupying what she believed to be her property. The record is devoid of any evidence that Shrader acquiesced in the fence, ledges and cliffs as the boundary of her property.

This case differs significantly from the situation in most boundary by acquiescence cases where the adjoining landowners occupy their respective parcels up to a mutually agreed upon boundary. The doctrine of boundary by acquiescence was designed to protect those landowners who had been mutually relying on a certain boundary from enforcement of a legal description which might differ from the understood boundary. Here the Carter's adjoining landowner prior to Hanrath could not acquiesce because she had no knowledge of their occupation of her property.

b. The law does not support a finding of acquiescence.

Occupation up to certain ledges, cliffs and fences by one of the landowners is not sufficient. The elements set forth in

Staker v. Ainsworth, 785 P.2d 417 (Utah 1990) must be read together:

1. occupation up to a visible line marked definitely by monuments, fences or buildings;
2. acquiescence in the line as the boundary;
3. for a long period of time; and
4. by adjoining landowners.

If these elements are read together it is clear that the adjoining landowners must both occupy up to the visible line and acquiesce in that line as the boundary for a long period of time. While the Hanraths have conceded that their land adjoins the Carter property, they do dispute that adjoining landowners have occupied the property to the cliffs, ledges and fence. The predecessor to Hanrath was a non-resident owner and did not "occupy" the property at any time.

Likewise, neither Mrs Shrader nor Mrs. Hanrath ever acquiesced in the fence, ledges of cliffs as a boundary. The elements for a boundary by acquiescence require both landowners to occupy up to and recognize a fence or monument as the boundary. This element has not been met in this case.

Carter relies on Hobson v. Panguitch, 530 P.2d 792 (Utah 1975); for the proposition that establishment of a boundary "requires the acceptance, or the giving of consent or approval by words or conduct over some substantial period of time . . .". A review of the record on appeal indicates that it is devoid of any evidence that the Hanraths or their predecessors gave consent or approval over a substantial period of time. Consent or approval implies knowledge and neither Shrader nor the Hanraths knew that

the Carters were claiming a portion of their property. The only possible claim of knowledge is that Shrader saw horses or cattle which apparently belonged to the Carters, "way down the way".

The Carters place a great deal of weight on the fact that the disputed boundaries were acquiesced to by the "community" for a long period of time. Staker is clear on this issue, the acquiescence must be between "adjoining landowners". The fact that his neighbors believed that he owned all the property he was occupying has absolutely no relevance.

Carter's brief states erroneously that "the Hanraths are urging this Court to adopt either the 'objective' or 'subjective' tests in determining whether there was uncertainty or dispute as to whether there was a boundary by acquiescence". Carter has clearly misinterpreted Hanrath's argument.

The objective and subjective tests referred to in the context of the Hanrath brief were used by the courts in determining whether there was acquiescence by the adjoining landowners. The Hanraths identified the tests in their brief as a means of informing this court of the various methods which have been used to determine whether there has been acquiescence. The objective test relies on the actual conduct, words, etc. of the landowners in determining whether there was acquiescence in a boundary. Lane v. Walker, 29 Utah 2d 119, 505 P.2d 1199 (1973).

The subjective test looks beyond actual conduct to inaction and silence. Wright v. Clissold, 521 P.2d 1224 (Utah 1974). However, the inaction and silence indicates acquiescence only

where the adjoining landowners have knowledge that the line is being treated as a boundary of their properties.

Acquiescence is more nearly synonymous with "indolence" or "consent by silence", or a **knowledge** that a fence or other monuments appears to be a boundary - but that no one did anything about it for forty-eight (48) years.

Lane v. Walker, 29 Utah 2d 119, 505 P.2d 1199, 1200 (1973).

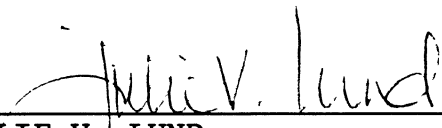
If a party claiming title by acquiescence fails to establish any of the elements which give rise to a presumption in his favor, then he has not proved his case. Fuoco v. Williams, 18 Utah 2d 282, 421 P.2d 944, 946 (1966). The evidence introduced at the trial of this matter simply does not support a finding that there was acquiescence in any fence, ledge or cliff as a boundary by adjoining landowners and consequently the trial court erred in quieting title to the subject property in Mr. Carter.

CONCLUSION

Defendant Hanraths ask that this Court reverse the ruling of the trial court quieting title in the Plaintiff and order that they be allowed full possession of their property as it is legally described on their deed and the corresponding plat map.

DATED this 23 day of December, 1993.

GREEN & BERRY



JULIE V. LUND
Attorney for Defendants Hanrath

P-223-91\Brief

CERTIFICATE OF MAILING

STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

I, JULIE V. LUND, certify that on December 27, 1993 I served two copies of the attached **BRIEF ON APPEAL** upon Brant H. Wall, the counsel for the Appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

BRANT H. WALL
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Julie V. Lund

and depositing the same, sealed, with first class postage prepaid thereon, in the United States Mail at Salt

Lake City, Utah on the 27 day of December, 1993.

SUBSCRIBED AND SWORN to before me this 27 day of December, 1993.

Patricia L. Dunn
Notary Public
Residing in Salt Lake
County, State of Utah

